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U.S. Department of Justice

Immigration and Naturalization Service

PUBLIC COPY

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

File: WAC 01 109 51233 Office: CALIFORNIA SERVICE CENTER

Date: JAN 30 2003

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

Petition: Immigrant Petition for Alien Worker as a Multinational Executive or Manager Pursuant to Section 203(b)(1)(C) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(1)(C)

IN BEHALF OF PETITIONER [REDACTED]

identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner was established in 1998 and is claimed to be a wholly-owned subsidiary of M. M. International, located in India. The petitioner is engaged in the manufacture, retail, and wholesale of blended spices, pickles and snacks. It seeks to employ the beneficiary as its president. Accordingly, the petitioner endeavors to classify the beneficiary as an employment-based immigrant pursuant to section 203(b)(1)(C) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(1)(C), as a multinational executive or manager. The director determined that the petitioner had not established that the beneficiary had been and will be employed in a managerial or executive capacity.

On appeal, counsel submits a brief claiming that the beneficiary performs the job duties of an executive.

Section 203(b) of the Act states, in pertinent part:

(1) Priority Workers. -- Visas shall first be made available . . . to qualified immigrants who are aliens described in any of the following subparagraphs (A) through (C):

* * *

(C) Certain Multinational Executives and Managers. -- An alien is described in this subparagraph if the alien, in the 3 years preceding the time of the alien's application for classification and admission into the United States under this subparagraph, has been employed for at least 1 year by a firm or corporation or other legal entity or an affiliate or subsidiary thereof and who seeks to enter the United States in order to continue to render services to the same employer or to a subsidiary or affiliate thereof in a capacity that is managerial or executive.

The language of the statute is specific in limiting this provision to only those executives and managers who have previously worked for the firm, corporation or other legal entity, or an affiliate or subsidiary of that entity, and are coming to the United States to work for the same entity, or its affiliate or subsidiary.

A United States employer may file a petition on Form I-140 for classification of an alien under section 203(b)(1)(C) of the Act as a multinational executive or manager. No labor certification is required for this classification. The prospective employer in the United States must furnish a job offer in the form of a statement which indicates that the alien is to be employed in the United

States in a managerial or executive capacity. Such a statement must clearly describe the duties to be performed by the alien.

The issue in this proceeding is whether the beneficiary has been and will be performing managerial or executive duties.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

The term "managerial capacity" means an assignment within an organization in which the employee primarily--

- (i) manages the organization, or a department, subdivision, function, or component of the organization;
- (ii) supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- (iii) if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- (iv) exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

The term "executive capacity" means an assignment within an organization in which the employee primarily--

- (i) directs the management of the organization or a major component or function of the organization;
- (ii) establishes the goals and policies of the organization, component, or function;
- (iii) exercises wide latitude in discretionary decision-making; and

(iv) receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petition describes the beneficiary's nontechnical duties as "marketing, distribution and promotion." No further description of duties was submitted with the petition. Therefore, on June 8, 2001, the director instructed the petitioner to submit further evidence to establish that the beneficiary had acted, and would continue to act, in an executive or managerial capacity.

In response, the petitioner provided a description of the beneficiary's general job duties. As that description was quoted in the director's denial, it need not be recited again. In regards to the beneficiary's job duties abroad, the petitioner stated the following:

During his tenure he has had 4 years retail experience working in companies [sic] own retail outlets in Bombay, India handling cash, purchases invoicing and stock control.

Then he handled for 10 years the companies [sic] manufacturing plant and office handling everything from manufacturing, packaging, sales and marketing accounts and day to day affairs of the company. He played a key role in the growth of his companies [sic] marketing department.

The petitioner also provided a list of duties the beneficiary performed during a "typical work week" for the U.S. company. A sampling of beneficiary's duties includes checking inventory, making invoices, bookkeeping, purchase, delivery, and other duties.

The petitioner's quarterly wage and withholding reports from December 2000 to June 2001 list the beneficiary as the only employee.

The director denied the petition, concluding that in light of the petitioner's size and the type of business it conducts, it is unreasonable to believe that the beneficiary will be primarily involved in qualifying duties.

On appeal, counsel submits a brief asserting that the beneficiary directs the management and "major components and functions" of the petitioning organization. Counsel also provides the following list of the beneficiary's duties:

Corporate Planning/Business Development. Specifically, Beneficiary plans the establishment and growth of Appellant's presence in the United States exotic foods market. This requires beneficiary's analysis and research of the market potential for all of Appellant's products. This also involves

beneficiary's formation of various distributor and sales networks across the United States. These distributors and sales representatives may be independent contractors for Appellant, as well as employees of Appellant or other food industry players.

Administration. The hiring and firing of personnel; maintenance of inventory acquisition of licenses, permits, insurance coverage and other regulatory requirements

Finance. As President, the beneficiary maintains close scrutiny and sustained control over the Petitioner's finances, and presents financial statements to Petitioner's investors, as well as recommends any need for changes in the Petitioner's funding structure

While not acknowledged by counsel, many of the duties listed above and previously, in response to the request for additional evidence, are of a non-executive nature. The record indicates that the beneficiary is the petitioner's only employee. As such, it is understandable that he is called upon to engage in conducting inventory, bookkeeping, and purchase and delivery of the petitioner's products. However, the needs of the petitioner clearly require the beneficiary's services in a variety of venues, such that his job duties cannot be limited primarily to those of a managerial or executive capacity. While the petitioner has previously indicated, by virtue of its organizational chart, that in addition to the beneficiary, the petitioner employs a warehouse/delivery man and about six temporary laborers, none of the wage statements or tax returns submitted indicate that the petitioner employs anyone other than the beneficiary. Simply going on record without supporting documentary evidence is not sufficient for the purpose of meeting the burden of proof in these proceedings. Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972).

Given the nature of the petitioner's business, it is clear that sales is the key component to the growth and development of the company. It is also apparent that the beneficiary is the petitioner's only permanent employee and is therefore required to assume the role of a sales person. Nevertheless, counsel asks the Service to overlook the fact that the beneficiary engages in day-to-day, non-qualifying duties because of the "high level of authority" he maintains within the organization. However, an employee who primarily performs the tasks necessary to produce a product or to provide services is not considered to be employed in a managerial or executive capacity. Matter of Church Scientology International, 19 I&N Dec. 593, 604 (Comm. 1988). The fact that the beneficiary exercises a high degree of discretionary authority is not sufficient in establishing that he is performing in an executive capacity when a majority of his duties are non-executive.

Counsel argues that "[t]he executive nature of the beneficiary's position is undeniable, and the size and newness of the Petitioner's business presence cannot serve to emasculate the beneficiary's position." Counsel further states that "absent the beneficiary's performance, the Petitioner would not function in any productive manner." While counsel's statements clearly illustrate the significance of the beneficiary's role within the petitioning entity, they also support the director's conclusion that the beneficiary's role is not primarily as an executive. Rather, the beneficiary's dominant role is actually providing the services of the petitioner.

While the reasonable needs of the petitioning company might be met by the services of one executive, the petitioner did not establish that the beneficiary has been and will be functioning as an executive. Merely because the demands of a small enterprise may be reasonably met by the services of one executive employee, that reasonable need does not absolve the employee to undertake duties of a non-executive nature. Regardless of the reasonable needs of the petitioner, the petitioner must still establish that the alien is to be employed in the United States in a primarily managerial or executive capacity and must clearly describe the duties to be performed by the alien. As discussed above, the petitioner has not established that the beneficiary has been and will be employed in a managerial or executive capacity.

In examining the executive or managerial capacity of the beneficiary, the Service will look first to the petitioner's description of the job duties. See 8 C.F.R. 204.5(j)(5). After careful review of the list of the beneficiary's duties, it is clear that the beneficiary has been and continues to engage in a majority of the petitioner's day-to-day non-qualifying activities. Although the beneficiary has control over the petitioner's daily activities, it is also clear that he is the one who carries out most of the work, regardless of its non-qualifying nature.

The record contains insufficient evidence to demonstrate that the beneficiary has been employed in a primarily managerial or executive capacity. Further, the record is not persuasive in demonstrating that the beneficiary's duties in the proposed position will be primarily managerial or executive in nature. The description of the duties to be performed by the beneficiary in the proposed position does not persuasively demonstrate that the beneficiary will have managerial control and authority over a function, department, subdivision or component of the company. Further, the record does not sufficiently demonstrate that the beneficiary will manage a subordinate staff of professional, managerial, or supervisory personnel who will relieve him from performing non-qualifying duties. The Service is not compelled to deem the beneficiary to be a manager or executive simply because the beneficiary possesses a managerial or executive title. The

petitioner has not established that the beneficiary has been or will be employed in a primarily managerial or executive capacity. Accordingly, the petition cannot be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not sustained that burden.

ORDER: The appeal is dismissed.